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No. 93-102

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN B. MATHES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

MICHAEL L. PAUP
Acting Assistant Attorney General

CHARLES E. BROOKHART
JOY L. PRITTS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether the exclusionary rule should be extended to prohibit the federal government from using, in a federal civil tax proceeding, state grand jury testimony procured by a state agent and delivered to the Internal Revenue Service.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 45-46) is unpublished, but the judgment is noted at 990 F.2d 1267 (Table). The opinion of the district court (Pet. App. 25-44) is unofficially reported at 92-2 U.S. Tax Cas. (CCH) ¶ 50,402.[1] The opinion of the court of appeals in a prior related case (see Pet. 6) is reported at 901 F.2d 1031. The opinion of the district court in that case (Pet. App. 49-65) is unreported.

[1] The caption of the district court's opinion shows petitioner as the plaintiff, Pet. App. 25, and does not accord with the caption of the case in the court of appeals, *id.* at 45. The district court's opinion itself makes clear, however, that the caption is erroneous. *Id.* at 25, 43.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1993. The petition for a writ of certiorari was filed on July 14, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was subpoenaed to appear before a state grand jury in Florida. Pet. App. 28. Although he was granted immunity by the State of Florida, petitioner refused to testify. A state court found him in civil contempt and ordered him incarcerated until he appeared and testified before the grand jury. On July 20, 1978, outside the presence of the grand jury, petitioner gave a sworn statement to an Assistant State Attorney who was designated as the legal advisor to the grand jury. In his statement, which was transcribed, petitioner admitted receiving $230,000 in 1977 from the sale of large quantities of marijuana. *Id.* at 28-29.

A copy of the transcript of petitioner's testimony was provided to the Internal Revenue Service by a detective with the St. Petersburg Police Department. Pet. App. 28-29, 37. The IRS agent who received the transcript was aware of the circumstances surrounding its creation, *id.* at 52, 62, but there is no indication in the record that the IRS encouraged, coerced, requested, or otherwise participated in the local official's conduct in obtaining the transcript and providing it to the IRS.

Petitioner did not file an income tax return for 1977, and he has no records relating to his unreported income for that year. Pet. App. 29, 53. After issuing him a notice of deficiency, the IRS assessed 1977

income taxes in the amount of $156,500.50 plus a civil fraud penalty in the amount of $83,845.89.[2] *Id.* at 53. A substantial portion of the assessed deficiency was based solely on petitioner's transcribed statement concerning his income from drug sales in 1977. *Id.* at 29, 53-54.[3]

Petitioner failed to pay the taxes due, and the United States filed this suit to reduce the assessment to judgment. On cross-motions for summary judgment, the district court agreed with petitioner that his statement constituted state grand jury testimony and that the IRS had committed a "technical violation" (Pet. App. 41) of Fla. Stat. § 905.27 (1969), which prohibits unauthorized disclosure or use of such testimony, when it accepted the transcript of his statement and used it as the basis for a tax assessment, without applying to the appropriate state court for a disclosure order. Pet. App. 37-38. The court, however, rejected petitioner's argument that suppression of the statement in the federal tax assessment proceeding was an appropriate remedy for any such violation. *Id.* at 42-43. Although the court held that state grand jury proceedings "should be accorded the same amount of protection in federal courts that is accorded to federal grand jury materials" (*id.* at 37), it noted that under Fed. R. Crim. P. 6(e) the

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[2] An addition to tax imposed under Section 6653(b) of the Internal Revenue Code is commonly referred to as a "fraud penalty." See M. Saltzman, *IRS Practice and Procedure* ¶ 7B.01 (2d ed. 1991).

[3] The remainder of the assessment pertained to income derived from sources other than the drug transactions. Sufficient funds have been collected to extinguish any liabilities related to that portion of the assessment. Pet. App. 54-55.

remedy for a violation of grand jury secrecy is a citation for contempt of court (Pet. App. 39). Similarly, the court accepted the government's argument that even if petitioner's rights had been violated by a state officer, suppression of the resulting evidence in a federal civil proceeding would be an inappropriate remedy. *Id.* at 40-42. The court therefore refused to suppress petitioner's statement, and held that the IRS assessment was valid and enforceable. *Id.* at 42-43.

The court of appeals affirmed without opinion. Pet. App. 45-46.

ARGUMENT

1. Petitioner asserts (Pet. 10) that his statement should have been suppressed because it was "obtained and used unconstitutionally." This argument fails for two reasons.

First, petitioner's rights under the Fourth Amendment were not violated by the disclosure of his statement. Such rights are violated only when challenged conduct interferes with a party's legitimate expectations of privacy. *United States* v. *Payner*, 447 U.S. 727, 731 (1980). A witness before the Florida grand jury does not have a privacy interest in his grand jury testimony. See *In re Grand Jury Proceedings—Subpoena to State Attorney's Office*, 832 F.2d 554 (11th Cir. 1987).[4] Thus, the purported

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[4] In *In re Grand Jury Proceedings*, grand jury witnesses sought to quash federal grand jury subpoenas ordering the State Attorney to produce the witnesses' state grand jury testimony, primarily relying (as does petitioner) on the grand jury secrecy provisions in Fla. Stat. § 905.27. The court of appeals, citing *State ex rel. Brown* v. *Dewell*, 167 So. 687, 690 (Fla. 1936), declined to quash the subpoenas, holding that

"seizure" of petitioner's testimony did not violate any of his Fourth Amendment rights, and he has no standing to invoke the exclusionary rule in this case.

Second, as the district court recognized, this Court has declined to extend the exclusionary rule to forbid the use in a federal civil proceeding of evidence illegally seized by a state criminal law enforcement agent. In *United States* v. *Janis*, 428 U.S. 433 (1976), federal authorities assessed a wagering excise tax using evidence obtained during a search by local officials that was subsequently found to violate the Fourth Amendment. The taxpayer sought to suppress the evidence on which the tax assessment was based. Noting that the "'prime purpose' of the [exclusionary] rule, if not the sole one, 'is to deter future unlawful police conduct'" (428 U.S. at 446), the Court explained that "[i]n evaluating the need for a deterrent sanction, one must first identify those who are to be deterred. In this case it is the state officer who is the primary object of the sanction." 428 U.S. at 448. Accordingly, the Court determined that the "additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation," 428 U.S. at 453-454, and held "that the judicially created exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign of

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under state law the witnesses had no personal privilege to have their grand jury testimony treated as a confidential communication. 832 F.2d at 560. If a grand jury witness does not have an evidentiary privilege of nondisclosure of his testimony, he certainly does not have any constitutional privacy interest in that testimony.

evidence seized by a criminal law enforcement agent of another sovereign." 428 U.S. at 459-460.

Thus, even if petitioner's statement was illegally "seized" by the state officer who provided it to the IRS, suppression would be inappropriate. There is no evidence in the record that the IRS encouraged, coerced, requested, or otherwise participated in the state official's conduct. Nor is there any support in the record for petitioner's speculations (Pet. 11-12) concerning the state of mind of the state officer and the IRS agent.[5] Because petitioner's statement was procured and delivered to the IRS without any participation by the federal government, the courts below properly concluded (Pet. App. 40, 42) that suppression was not warranted in a federal civil tax case where its deterrent effect on state officials would be "marginal."[6]

2. Petitioner's assertion that his Fifth Amendment rights were violated by the government's use of his statement is likewise without merit. The Fifth

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[5] In the prior proceeding on petitioner's request for injunctive relief, the district court found only that "[t]he [IRS] agent receiving the information was aware of the circumstances surrounding the taking of the statement," Pet. App. 52, and that "[a]nyone reading the [statement] would have been made aware" of its connection to the grand jury proceedings, *id.* at 62.

[6] Petitioner's reliance (Pet. 21) on *Suarez* v. *Commissioner*, 58 T.C. 792 (1972), is unjustified. In *Janis*, this Court discussed and explicitly rejected *Suarez*, at least in the inter-sovereign context. 428 U.S. at 456-458. Similarly, *Romanelli* v. *Commissioner*, 466 F.2d 872 (7th Cir. 1972), upheld the suppression of a taxpayer's statement unlawfully obtained by an agent of the same sovereign; it is inapposite to the inter-sovereign deterrence question presented by this case and controlled by *Janis*.

Amendment protects against the use of compelled testimony only in criminal cases. Therefore, although testimony given under a State's grant of immunity may not be used against a party in a federal criminal proceeding (see *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964)), there is no constitutional bar to the use of such testimony against a party in a civil proceeding. See *United States* v. *Apfelbaum*, 445 U.S. 115, 125 (1980); *United States* v. *Cappetto*, 502 F.2d 1351, 1359 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

Relying on *Boyd* v. *United States*, 116 U.S. 616 (1886), petitioner argues (Pet. 15-17) that his immunized testimony may not be used against him in this civil case because the imposition of a civil fraud penalty under the Internal Revenue Code renders the proceeding "quasi-criminal." In *Boyd*, the Court stated that "suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature," and characterized such suits as essentially "criminal proceedings for all purposes of the Fourth Amendment * * * and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself." 116 U.S. at 634. This Court has subsequently declined, however, to treat all penalties or forfeitures as quasi-criminal proceedings under *Boyd*. See *United States* v. *Ward*, 448 U.S. 242, 253 (1980). Instead, the Court has analyzed a number of factors to determine whether a penalty is sufficiently "criminal" in nature to trigger the Self-Incrimination Clause of the Fifth Amendment. See 448 U.S. at 249, 253-254; see also *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963).

This Court has previously determined, in the closely analogous context of the Double Jeopardy Clause, that the civil fraud penalty at issue here is not a criminal sanction, but an addition to tax "provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." *Helvering* v. *Mitchell*, 303 U.S. 391, 401 (1938).[7] See also *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 360 (1984) (discussing *Mitchell*). Indeed, petitioner himself recognizes (Pet. 17) that "the immediate end [of this proceeding] is to collect taxes and not [to] punish Petitioner for his wrongdoing." Thus, contrary to petitioner's assertions, the present case is a purely civil proceeding. The Fifth Amendment does not proscribe the use of petitioner's immunized testimony in such a proceeding.

[7] *Mitchell* involved Section 293(b) of the Revenue Act of 1928, ch. 852, 45 Stat. 858, the statutory predecessor to Section 6653(b) of the Internal Revenue Code of 1954, which was the basis for the fraud penalty assessed in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MICHAEL L. PAUP
Acting Assistant Attorney General

CHARLES E. BROOKHART
JOY L. PRITTS
Attorneys

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